IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA)
) CRIMINAL ACTION
V.)
) NO. 2:12cr105
THOMAS E. ARNEY,)
)
Defendant.)

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

July 22, 2013

(Sentencing Hearing)

Before: THE HONORABLE RAYMOND A. JACKSON
United States District Judge

Appearances:

UNITED STATES ATTORNEY'S OFFICE
By: KATHERINE MARTIN, ESQUIRE
MELISSA E. O'BOYLE, ESQUIRE
and
UZO ASONYE, ESQUIRE
Assistant United States Attorney
Counsel for the United States

SWARTZ TALIAFERRO SWARTZ & GOODOVE
By: WILLIAM L. TALIAFERRO, JR., ESQUIRE
and
MELVIN RADIN, ESQUIRE
Counsel for the Defendant

The defendant appearing in person.

Also Present:
Jeffrey A. Noll, Probation Officer
Robert W. Ellis, Probation Officer

(Court convened at 2:30 p.m.)

THE DEPUTY CLERK: United States of America versus Thomas E. Arney, in criminal case 2:12cr105.

Ms. Martin, is the United States ready to proceed?

MS. MARTIN: We are ready.

Good afternoon, Your Honor.

THE COURT: Good afternoon, Ms. Martin.

THE DEPUTY CLERK: Mr. Taliaferro and Mr. Radin, is the defendant ready to proceed?

MR. TALIAFERRO: Yes. Good afternoon.

THE COURT: Good afternoon.

Mr. Arney, have you had adequate opportunity to consult with your counsel to be prepared for the hearing this afternoon?

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied with the advice and counsel you are receiving?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Fine. You may have a seat.

The Court has had an opportunity to review the position papers filed by the United States and filed by the defendant in the case, and the Court notes no objections to the presentence report filed by the United

States. Is that still the case?

MS. MARTIN: That is the case, Your Honor.

THE COURT: Did the United States make a motion for the defendant to receive an additional one point for acceptance of responsibility?

MS. MARTIN: The government did make that motion, Your Honor.

THE COURT: All right. That motion will be granted.

The Court likewise notes no objections to the presentence report from the defendant; is that correct?

MR. TALIAFERRO: That's still the case, yes, sir.

THE COURT: All right. There's one thing the Court wants to clear up regarding the position paper. You made a motion to file under seal, just a straight motion without the appropriate support, to file your position paper, I believe, under seal.

The Court is questioning the necessity to file that paper under seal. I have read it. It seems to track what is already known and what will probably come out in this hearing, so the Court is questioning the necessity. I think the government filed the same thing.

MS. MARTIN: Well, Your Honor, traditionally, as the Court knows, the government files --

THE COURT: 5-Ks?

MS. MARTIN: Motions pursuant to 5K under seal, which we have done. And I believe Mr. Taliaferro's position on sentencing, while it tracks the government's motion which was made under seal, I believe it also contains a reference to the sentence reduction that the government has suggested and that was filed under seal by the government. So it does make reference to things the --

THE COURT: Yes, but my question is does the government intend to argue the same thing here this afternoon? Do you intend to mention it at all?

MS. MARTIN: I wasn't going to mention the specific number, Your Honor. I think the government has set forth its position adequately in its written filings and I think would make our argument simply track that, without making reference to necessarily specific numbers.

THE COURT: Okay. Thank you very much.

Thank you, Mr. Taliaferro. The Court is going to simply grant the motion to file under seal. Both parties have done that, and I will address the matter raised by Mr. Maglone in a separate order. But I think that will probably be moot after this hearing anyway, in any event.

Okay. The Court finds that there are no

objections to the presentence report at this juncture.

Mr. Arney, will you please stand.

Mr. Arney, at this juncture the Court finds you have a criminal history category of I, an offense level of 26, with an advisory sentencing guideline range of 63 to 78 months.

You may call witnesses this afternoon to assist the Court in determining what sentence is appropriate, what sentence is sufficient but not greater than necessary.

You may testify yourself, if you to wish do so. You also have the option of remaining silent and having Mr. Taliaferro to handle all matters for you. Do you understand this?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Taliaferro, the Court has about 18 letters it will note in a few minutes, but will you be calling any live witnesses?

MR. TALIAFERRO: No, sir, I will not.

THE COURT: Will Mr. Arney be making any statement at any point?

MR. TALIAFERRO: I don't believe he will, no, sir.

THE COURT: If you make an unsworn statement, you will not be subject to cross-examination. If you make a sworn statement, you will be.

THE DEFENDANT: Yes, sir.

THE COURT: All right. If he changes his mind, let me know. Thank you very much.

Also filed in the record is a document entitled "Motion for Downward Departure" or "Downward Adjustment for Acceptance of Responsibility." Pursuant to Section 5K1 the government has filed a motion in this case. The Court has had an opportunity to examine the motion pursuant to the sentencing guidelines. Having tried this case for ten weeks, the Court well understands the basis for the motion. The Court believes that the United States has adequately documented the justification for the 5K1 motion. The motion will be granted.

That being the case, the Court finds it appropriate to grant the motion and the Court will grant the motion with a downward departure to an offense level 18 with an advisory sentencing guideline range of 27 to 33 months.

That means, Mr. Taliaferro, that certainly the Court will consider sentencing the defendant someplace in that range.

MR. TALIAFERRO: Yes, sir.

THE COURT: Now, that having been said, the Court wants to note for the record the following letters have been received, and the Court has read these letters: a Mr. Richard James, a retired police officer; Leonard M. Newcomb, III; a letter from Izaak D. Glasser; Matthew G. Miller; Ronald A. Zoby; Thomas E. Baldwin; William L. Spruill, a retired police officer; Krista R. Arney; Ashlee Arney; Thomas Ryan Arney; Douglas W. Fuller of Precon Marine; Paul Decker; Attorney Peter G. Decker, III; Attorney H. Joel Weintraub; W. Preston Fussell from Precon. I think he's the president; a letter from Carol Powell at Children's Hospital of the King's Daughters; and a letter from Natasha Terry.

Those were the letters the Court had, unless you have some more, Mr. Taliaferro?

MR. TALIAFERRO: No, sir. That's all the letters.

THE COURT: All right. The Court has read all of those letters that speak positively of the defendant as a community leader. Not a community leader, but someone in the community who is compassionate and supportive of other people, as one who has been a successful businessman and a friend. So the Court has read those letters and articles.

At this juncture, the Court is prepared, if there are no witnesses for the defendant -- are there any victim witnesses, Ms. Martin, that wish to be heard?

MS. MARTIN: The government has no evidence, Your Honor, only argument.

THE COURT: That being the case, the Court is prepared to hear argument.

MS. MARTIN: As the Court has already indicated, having presided over a ten-week jury trial, the Court is certainly well acquainted with the facts of this case and the role that each of the culpable parties played. Mr. Arney, like many others, engaged in a mutually beneficial lending relationship with insiders of the Bank of the Commonwealth.

Now, the fact that others engaged in this same scheme or that bank insiders made it all possible does not excuse Mr. Arney's conduct. Mr. Arney got a lot of money from the Bank of the Commonwealth, over $7.5 million, over the course of this conspiracy alone.

And despite his limited education, Mr. Arney is a very smart man. He's a very savvy man and he knew exactly what he was doing. He was exploiting for his own personal gain the culture of fraud and deceit that was rampant at that community bank.

Now, that said, Mr. Arney possesses a number of characteristics that weigh in his favor. Both the personal history laid out in the presentence report as well as the character references that the Court has just mentioned all describe a person who has overcome a number of obstacles in his life, including an abusive family, poverty and a lack of education, to become, according to the letters and the presentence report, a devoted family man and friend as well as an owner and operator of a number of successful businesses.

I think of particular note was the very sincere letter written by the defendant's son, and I think what was compelling about Mr. Arney's son's letter was that at one point in this letter he says that the day that his dad pled guilty, he was filled with admiration for him. I thought that was so striking for him to say because the fact of the matter is Mr. Arney has expressed great remorse for involving his family in these crimes. But not only that, he set a tremendous example for them by pleading guilty and accepting responsibility for his conduct and the mistakes that he has made.

Mr. Arney is readily distinguishable from the other defendants in this case, both the cooperating defendants and those that are convicted at trial. First of all, the losses that were directly attributable to Mr. Arney's lending relationship are significantly less than the losses associated with other fraudulent loan relationships at the bank.

Second, though he certainly made the most of the opportunity presented by bank insiders, Mr. Arney was a customer of the bank and ultimately didn't owe a fiduciary duty to its shareholders.

Finally, though, and most importantly, Mr. Arney did not minimize his conduct, he did not blame others for it, and he did not lie about it. Instead, a few short weeks after receiving a target letter from the United States prior to his indictment, he confessed to his crimes and he began to cooperate with the government.

To that end, as the Court knows, Mr. Arney has provided critical and substantial assistance in one of the most complex bank fraud prosecutions having been brought in this district.

I would only emphasize what the Court knows, having witnessed Mr. Arney's testimony at trial, it was both candid and compelling. It was fully consistent with the information he gave investigators throughout the course of the investigation and was certainly credible. So the government asks and has passed up a consent order of forfeiture as well as a restitution order in this case which will be paid to the Federal Deposit Insurance Corporation.

For all these reasons, the government recommends that the Court depart downward, which it has done, to a 27- to 33-month advisory guideline range. The government believes a sentence within that range is appropriate and both reflects the defendant's contrition and his cooperation as well as the seriousness of this offense and the clear message that people in *quid pro quo* relationships will not be tolerated in our financial institutions.

Thank you, Your Honor.

THE COURT: Thank you.

Mr. Taliaferro.

MR. TALIAFERRO: I have just a couple of remarks, Your Honor. I would ask you to sentence him to the low end of the guidelines, to the 27 months. I think that would be appropriate in this case. I'm just going to cite a few reasons why I think that it is appropriate.

There is no question that in this case we are dealing with a truly, I guess, unique and unusual individual. I mean, you read his life story, as I put in my position paper. It reads almost like a work of fiction when you read this.

He has got a fourth grade education. He does not know how to read and write. I know this personally because I taught him to sign his name. He didn't even know how to sign his name. He had a terrible, violent upbringing. Lives in foster homes and orphanages, lives on the street, living in cars. Then what's important is he survives near terminal cancer. He had less than a 50-50 chance to live earlier this year, and through sheer determination, I believe, he pulled himself through that.

In spite all of that, he became a great father. There's no question about that. It's referenced in the letters. He became a great businessman. You have got some letters from some very prominent businessmen who talked about their relationship with him and the type of businessman he was, and he did this by working. As he said, he started hauling trash, selling cars and selling property, and finally got into the restaurant business. And despite all of that, he became a man of great compassion.

I'm not going to read every letter, but you have got a letter from Ron Zoby that talks about being sick in the hospital for six months and this man would come to see him and bring him food, and that takes time out of your day when a person is in the hospital for six months and you are going to see them and bring him food.

Last year, as you know, we had a great human being, a lawyer, that we lost last year, and you have got a letter from his two sons in there that I think are as heartfelt as you are going to ever find about what Mr. Arney did to make his life a little easier at the end. And that takes work as well.

You got a letter from William Spruill, a retired major on the police force in Chesapeake. He says that Mr. Arney provided all the food whenever an officer was killed in the line of duty. Mr. Arney was the one that provided the food, and he says that -- 32 years on the police department and he says he's never written a letter like this, never written a letter like this.

And you have got a letter in there from Thomas Baldwin, the Clerk of Court in Norfolk. He talks about he's been the clerk for 41 years and he basically says I would not even consider writing a letter -- never done it before -- wouldn't even consider writing a letter for anybody other than Mr. Arney.

And then you have got the articles that I presented to the Court about those children that couldn't even go out because of this disease that they had. They didn't have the suits that they needed, that Mr. Arney is the one that raised the money. The article goes on to say at one point he put a dare up. He said, I will shave my head if you customers of mine can come up with the money in this case.

And, again, this is all before this. So this is not some change of heart where a person is trying to do something now to get some sympathy. This was done years ago that he did this. And he estimates that he provided fifty to a hundred thousand dollars to various charities while he was doing this. So every letter you have deals with some charitable work that he's done.

Just to echo what the government says for a minute, he has expressed tremendous contrition for what he has done. I agree that he and probably Mr. Etheridge are a little different in this case because they are not insiders, and the government makes that absolutely clear. They were troubled borrowers in what I called troubled times. He is the only codefendant indicted along with this group that pled guilty and cooperated.

And the government in arguing its position, they say, quote, he provided critical and substantial assistance. I think he, in some ways, provided a foundation for some of that case.

The government goes on to say that there were certain areas that they could not have presented evidence but for Arney's cooperation. In other words, it could not have been done but for his cooperation. His testimony was truthful. The jury believed him. They believed him. His testimony was absolutely truthful.

He cooperated prior to being indicted. Prior to being indicted, he had acknowledged his guilt, agreed to cooperate and agreed to plead guilty. And on the proactive side, he convinced another witness to come forward that knew something about this, to plead guilty. Well, actually they didn't plead guilty, but to cooperate and testify at the trial, and that witness also was a compelling witness.

So he's admitted all of his involvement in this prior to his indictment. He testified, as the government says, over a two-day period during trial. I was here for some of that. The government says the cross-examination was harsh. It may have been worse than harsh. Five separate lawyers from different parts of the country in some ways cross-examined him. He held up under that, and the jury believed him.

His early cooperation helped the government tremendously in preparing for this case. So this is an unusual man with, I think, an extraordinary amount of cooperation. The guidelines are advisory in this case, and I would ask the Court to do what the Court thinks is appropriate in this case because, as I say, his cooperation has been way beyond what we normally see.

THE COURT: Thank you, Mr. Taliaferro.

Mr. Arney, if you would join Mr. Taliaferro at the podium, please.

Did he ever make a determination whether he wishes to make any statement or not?

MR. TALIAFERRO: I don't think he does.

THE DEFENDANT: I think everything has been said, Your Honor.

THE COURT: Okay. Mr. Arney, I thank you.

Mr. Arney, the Court has to impose a sentence that's sufficient but not greater than necessary. That's the legal standard. And to do that, the Court will go through a series of considerations here on the record.

The Court has read the presentence report in detail, and the Court has a vast amount of information about your background that the Court will not take time to put into this record, but the Court is certainly aware of all the 3553 factors that might pertain to your case.

You stand before the Court having been convicted on three counts of conspiracy to commit bank fraud, misapplication of bank funds and unlawful participation in a loan during the period of January 2008 through September 2011.

Now, one of the things the Court also looks at is really who are you, your personal background? I believe you are 56 years old?

THE DEFENDANT: Fifty-seven.

THE COURT: Okay. Fifty-seven years old. And I believe counsel has alluded that you really had a traumatic upbringing as a child: abusive family relationships, no education. You dropped out at, I believe, the fourth grade. You had serious personal history and issues you had to deal with, but the record reflects an ability to overcome and to adjust.

Your counsel has indicated you became a successful businessman, an individual of compassion in the community. You did a lot of positive things with your life, notwithstanding the traumatic experiences you had as a child.

The record reflects that you were self-employed since 2005 as the owner of Freedom Trucks & Cars known as Moyock Muscle. From 1985 to 2011 you sold various residential and commercial properties. I think in 2009 you had over $1 million earned as a result of your efforts dealing with residential and commercial properties. So you were successful in conducting your business.

At some point you got involved with the Bank of the Commonwealth and got engaged in all kinds of illegalities. You profited from, as some have put it, the rather corrupt culture that existed at the Bank of the Commonwealth. You were able to get loans freely, and I believe that had an impact on you beginning to do things you shouldn't do.

The question the Court asked was with a man who had the ability to build the empire that you have and to overcome all the personal problems that you have had, how did you manage to at this point in your life slip into this corrupt activity and jeopardize everything you had worked so hard to gain? That is the question, but you did it. Notwithstanding, you did it.

You have no problems of substance abuse that the Court has been able to really verify in this report.

Physically you seem to be in good shape, though you overcame cancer through perseverance back in 1990, and you have no real serious psychiatric problems that would account for your activities. So the Court probably concludes a lot of it has to do with plain greed that got you involved in this situation.

But the good thing about it is at some point you realized you were wrong and began to cooperate, though you did it late. You began to cooperate, and that is evidenced from your testimony in this case and your continuing cooperation with the United States.

Now, the United States has filed a 5K1 motion -- we seldom see those motions around here as judges, Mr. Arney -- because of your cooperation in this case, and the Court certainly takes that into consideration.

The Court also has to provide for restitution to the victims in this case, and the Court has a restitution order up here where you are going to be required to pay back over $2 million.

As the Court looks at your resources, hopefully you will find a way to immediately convert some of those resources and pay folk that need to be paid, because a lot of times victims don't get reimbursed because of the lack of resources that the defendant has. So we hope that that's what will happen in this case.

Now, in terms of imposing your sentence, one thing the Court has to do is to be sure that your sentence is not disproportionate to other sentences imposed in a case where you have conspirators and, etc. Your case is unique and different. Certainly you did not proffer as much as others, and you weren't in this conspiracy as long as others. You have a lower offense level than other persons involved in this conspiracy, and you are also the recipient of a 5K1 motion because you chose to cooperate and some others did not cooperate. So the Court believes we have no problems with disparities because of sentencing.

But at the end of the day, Mr. Arney, there is a penalty to be paid when you get involved with something this criminal. So, hopefully, you will go in, do the time you have to do, come back out and keep on with your life.

In most cases if an individual is a model prisoner, that individual serves about 85 percent of the time minus probably another six months to a community facility before release. So that's what usually happens, and I'm sure your lawyer can inform you exactly how much of the time you will be spending that the Court chooses to impose in this case.

But having weighed all the sentencing factors in this case, the Court believes it's appropriate to sentence you as follows:

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant Thomas E. Arney is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 27 months. The term consists of 27 months on Count 1, 27 months on Count 2 and 27 months on Count 3, all to be served concurrently.

Upon release from imprisonment, you shall be placed on supervision for a term of three years. This term consists of three years on Count 1, three years on Count 2, a term of three years on Count 3, all to run concurrently.

You shall also comply with the following additional conditions, Mr. Arney: You shall provide the probation officer access to any requested financial information. You shall not incur new credit charges or open additional lines of credit without the approval of the probation office.

You shall apply all monies received from income tax refunds, lottery winnings, inheritances, judgments and any anticipated or unanticipated or unexpected financial gains to the outstanding court ordered financial obligation, or a lesser amount to be determined by the Court upon the recommendation of the probation officer.

You shall participate in the Treasury Offset Program as directed by the probation officer. You shall not be self-employed in the real estate industry, purchasing and/or selling properties during your period of supervision.

Now, the Court looks at the financial losses sustained by the victims, your net worth, your liquid assets, your lifestyle, your earning potential, the lack of dependents relying on you for support. The Court will note a few minutes ago when the Court was going through the 3553 factors that you do have grown children that the Court is familiar with from the testimony in the case. The Court finds you are not capable of paying a fine, but you are capable of making full restitution as required by statute, so you are to pay the following penalties:

As to Count 1, you shall pay a special

assessment of $100, you shall pay a special assessment of $100 on Count 2 and Count 3, for a total special assessment of $300.

You shall make restitution to the FDIC in the amount of $2,053,088.21.

The Court has a restitution order here. Did you sign this order, Mr. Arney?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand the restitution order is a part of your sentence in this case? If you fail to make the restitution, you could be back in here facing a revocation of your supervised release heading back to prison, if you fail to make the appropriate payments.

Now, the Court is going to enter this restitution order. You can pay the whole thing today and get it behind you or if it's not paid by the time your supervision begins, it shall be due in installments of not less than $500 per month until paid in full and the first payments will be due 60 days after your supervision begins.

The Court also has a forfeiture order here. Did you sign this forfeiture order?

THE DEFENDANT: Yes, sir.

THE COURT: Did you talk to Mr. Taliaferro about this order before you signed it?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand it?

THE DEFENDANT: Yes, sir.

THE COURT: All right. The Court is going to sign the forfeiture order and that will go into the record. You have agreed to a money judgment in the amount of $7,541,582.18, and you have agreed to forfeit a whole series of properties and items in this forfeiture order. That will be going into the record today.

Now, Mr. Taliaferro, did Mr. Arney waive his right to appeal when he pled in this case?

MR. TALIAFERRO: Yes, sir, he did.

THE COURT: Mr. Arney, I'm not advising you of any right to appeal because you waived at the time you entered your plea.

Are there other matters to be addressed, Ms. Martin?

MS. MARTIN: No other matters for the government.

THE COURT: Mr. Taliaferro?

MR. TALIAFERRO: Yes. I filed a motion for Mr. Arney to self-report. I think the government would agree with me. I have asked for 90 days. I think the government feels 90 days is appropriate. One of the reasons, as you have alluded to, is he still has to assist them with this forfeiture. There are cars in North Carolina. There are lots of things he has to do. So I think it would be to the government's benefit, as well as Mr. Arney, if he were allowed to self-report in about 90 days from today, sir.

MS. MARTIN: I would note for the Court that the government has no objection to Mr. Taliaferro's motion. I will say that Mr. Arney has been working actively with our forfeiture attorneys. Judge, there's a lot, as you can see in the consent order of forfeiture, to liquidate. Some of the things that need to be liquidated down in Moyock, in particular, it would be helpful to have Mr. Arney's involvement in that. So we wouldn't object but understand that the Court will determine an appropriate self-report date.

THE COURT: The Court has a problem with 90 days, Mr. Taliaferro. The government is just going to have to speed up its action here. The Court has gone a little further than it usually goes and will have him self-report in 30 days.

On August 22nd before 2:00 p.m. you report to the facility that they tell you to report to. If they have not given you a place to report, you report to the U.S. Marshal on this hall before 2:00 p.m., but 30 days is about all the Court is going to do on that. I think the government can get it done.

All right. Anything else?

MR. TALIAFERRO: No, sir.

THE COURT: All right. Court will be in recess until further notice.

Let's get back on the record.

I'm sorry. There's one warning I failed to give you, Mr. Arney. You are a convicted felon facing jail time. If you violate your bond, you are going to be picked up and you are going to be faced with other criminal charges. Do you understand this?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now we are adjourned.

(This hearing concluded at 3:08 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

X /s/ X X January 13, 2015 X

Sharon B. Borden, RMR, FCRR Date